IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 79-129

MILLETTE & ASSOCIATES, INC., Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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July 25, 1979

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CITATIONS

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Petitioner,

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The Petitioner Millette & Associates, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 27, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals, which appears in the Appendix hereto, is reported at 594 F.2d

121 (1979).

The opinion of the United States Tax Court, which appears in the Appendix hereto, is reported at 37 TCM 774, Dec. 35, 153(M)(1978).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 27, 1979. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. In view of the continued enormous growth of Government and its agencies, combined with the trend for laws, rules, regulations, and decisions to be generally unfavorable to taxpayers, whether Congress can constitutionally delegate its legislative authority and responsibility to the Secretary of the Treasury through Sections 1501 through 1505 of the Internal Revenue Code of 1954 regarding consolidated income tax returns through the vehicle of

regulations that are legislative in nature.

2. Whether the filing of an application for automatic extension of time to file corporation income tax return, Form 7004, under IRC Code Section 6081(b) and the payment of a tentative estimated income tax (a) should be construed to be the filing of an income tax return; (b) if not, does information furnished on the application absolutely determine the type of income tax return that must be filed within the extended period; (c) rectify the consequencies of the late filing of the income tax return after the expiration of the extension period, as to tax elections, interest, penalties, and privileges.

3. Whether deciding different results in cases having substantially identical facts, due to the arbitrary application of tax regulations, is in violation of the Fourth and Fifth Amendments to the Constitution which guarantee due process and equal

protection under the laws, since for all practical purposes, the volume and complexity of income tax laws, rules, and regulations put a large number of taxpayers at a distinct disadvantage, including minorities and small business men without the resources or capabilities of dealing therewith.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 26:

Section 1501. Privilege to File Consolidated Returns.

An affiliated group or corporation shall, subject to the provisions of this Chapter, have the privilege of making a consolidated return with respect to the income tax imposed by Chapter 1 for the taxable year in lieu of separate returns. The making of a consolidated return shall be upon the condition that all corporations which at any time during the taxable year have been members of the affiliated group consent to all the consolidated return regulations

prescribed under Section 1502 prior to the last day prescribed by law for the filing of such return. The making of a consolidated return shall be considered as such consent. In the case of a corporation which is a member of the affiliated group for a fractional part of the year, the consolidated return shall include the income of such corporation for such part of the year as it is a member of the affiliated group.

Section 1502. Regulations.

The Secretary or his delegate shall prescribe such regulations as he may deem necessary in order that the tax liability of an affiliated group of corporations making a consolidated return and of each corporation in the group, both during and after the period of affiliation, may be returned, determined, computed, assessed, collected, and adjusted, in such manner as clearly to reflect the income tax liability and the various factors necessary for the determination of such liability, and in order to prevent avoidance of

such tax liability.

Section 1503. Computation and Payment of Tax.

(a) General Rule. In any case in which a consolidated return is made or is required to be made, the tax shall be determined, computed, assessed, collected, and adjusted in accordance with the regulations under Section 1502 prescribed before the last day prescribed by law for the filing of such return.

Section 1504. Definitions.

Section 1505. Cross-References.

Section 6072(b). Returns of Corporations.

Returns of Corporations under Section 6012 made on the basis of the calendar year shall be filed on or before the 15th day of March following the close of the calendar year, and such returns made on the basis of a fiscal year shall be filed on or before the 15th day of the third month following the close of the fiscal year. Returns required for a taxable year by Section 6011(e)(2) (relating to returns of a DISC) shall

be filed on or before the 15th day of the ninth month following the close of the taxable year.

STATEMENT OF THE CASE

The petitioner is a corporation organized and incorporated under the laws of the State of Mississippi and engaged in the business of operating an insurance agency on the Mississippi Gulf Coast. On May 15, 1972, petitioner acquired 80% of the outstanding capital stock of Millette Enterprises, Inc. and at that point the two corporations became eligible to file a consolidated corporation income tax return for the year 1972, and engaged a certified public accountant and a tax attorney for the preparation of the consolidated return and for other reasons.

During the year 1974, an audit of the 1971 separate returns of the two corporations was commenced by IRS, and the agent subsequently audited their 1972 consolidated return, which the IRS Service Center was unable to locate. Petitioner furnished from

its files a copy of a Form 1120, Federal Income Tax Return, including its 80% owned affiliate, Millette Enterprises, Inc., for the year 1972, showing a consolidated net loss of $103,508.00, and maintained that the return had been properly and timely filed. On May 9, 1975, upon the advice of counsel, petitioner filed with Internal Revenue Service Center at Chamblee, Georgia, another Form 1120, U. S. Corporate Income Tax Return, for 1972 identical to the one it contends it filed earlier on a timely basis. Thereafter, the petitioner received a Statutory Notice of Deficiency dated March 9, 1976 showing a deficiency in tax for the year ended December 31, 1972 in the amount of $59,169.92 and with an addition to the tax in the amount of $14,792.48 imposed as a penalty for late filing. In its Notice of Deficiency, respondent contended that the petitioner could not file a consolidated return for the year 1972 because the income tax return for that year was filed late.

The filing of a consolidated return for 1972 was important to the petitioner because by combining the net incomes or losses of the two corporations, no federal income tax would be due for the year 1972. Other issues were also involved that are not included in this petition.

Following a one-day trial, the United States Tax Court held in favor of the respondent, ruling that a parent corporation was not entitled to file a consolidated return with its subsidiary where such return was not timely filed, quoting Treasury Regulation Section 1.1502-75(a) as the basis for the decision.

The decision rendered by the United States Tax Court in respondent's favor was affirmed by the Court of Appeals, on the ground that the express language of the regulation cited is controlling. Petitioner contended that its case was substantially identical to Daron Industries, Inc. vs. Commissioner,

62 TC 847 (1974), wherein a consolidated return was filed six days late. Both the Tax Court and the Court of Appeals rejected this argument primarily on the ground that Daron was decided on the basis of a pre-1966 regulation which is the predecessor of the above cited regulation, and that the current Treasury Regulation upon which the petitioner's case was decided is different from that which applied in Daron, and that this precludes acceptance of the late return in this case. The Court of Appeals held, in short, that by virtue of Treasury Regulation Section 1.1502-10(A)(a), a consolidated return filed six days late was acceptable, whereas when that regulation was modified in 1966 to become present Treasury Regulation Section 1.1502-75(a), a consolidated return filed late would not be acceptable as a consolidated return.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING EFFORTS TO CREATE AND MAINTAIN LEGISLATIVE POWERS IN THE FEDERAL EXECUTIVE BRANCH OF GOVERNMENT.

It is respectfully submitted that this Honorable Court would probably be willing to take judicial notice of the fact that most all Government agencies and bureaucracies have tendencies to promote their own growth, permanency, and resources. Not the least of these is the Treasury Department with its long and growing arm, the Internal Revenue Service. The considerable power and authority now held and readily exercised by the Treasury Department through the Internal Revenue Service has come about in no small way by the actions of Congress, which has for reasons that remain mysterious, seen fit to openly endow the Treasury Department in the Internal Revenue Service with far-reaching legislative and lawmaking authority not to be found elsewhere

in the entire Government structure.

It may seem odd that this subject would come up in connection with a petitioner's case involving its right to file a consolidated income tax return, but strangely enough, it is in this area that the point can be best illustrated. The unconstitutional delegation of power by Congress in connection with the consolidated return privilege is not obscure, in as much as thousands and perhaps millions of small and large businesses do or could avail themselves of the privilege of filing consolidated corporation income tax returns, and the impact of this question is substantial, recurring and troublesome.

The Internal Revenue Code is a long and complex conglomeration of law, rules and procedures. The Cross-References alone require hours of meticulous research to determine applications. But Congress does its duty, passing laws dealing with various tax matters. The Code Sections on charitable contributions alone contains nineteen pages, 88 major

sub-parts, and approximately 12,000 words. Yet when Congress tackled the problem of filing a consolidated return, it apparently decided either that the subject was unimportant or was too difficult to work with. Practically all of the consolidated return law has been promulgated and adopted by the Commissioner of Internal Revenue. It appears that it could be said that here is the only subject upon which Congress feared to tread.

It is interesting to note that the first regulations on consolidated returns were promulgated by the Internal Revenue Service without specific authority. Section 213 of the Revenue Act of 1917 stipulated "that the Commissioner Of Internal Revenue should make all necessary regulations for carrying out the provisions of this title....". The Commissioner quickly issued rules on consolidated returns that applied only to excess profit taxes, but consolidation was mandatory at the discretion of the Commissioner.

The 1954 Internal Revenue Code, in the form in which it passed the House of Representatives, would have written the consolidated return regulations into the statute. In recommending this change from regulation to code, the Ways and Means Committee report, H.Rep. 1337, 83rd Congress, Second Session, Page 87, stated: "Since these regulations have been generally accepted and have become stabilized, your Committee has inserted them into the law, changing them only to the extent necessary to reflect changes your Committee has made elsewhere in the Code."

In this agreement, the Senate Finance Committee stated, in Sen. Rep. No. 1622, 83rd Congress, Second Session, Page 120: "Under the House Bill, the consolidated return regulations were inserted into the Statute. While your Committee recognizes that these regulations have been generally accepted, your Committee believes that it is more appropriate to have these detailed rules in the form of regulations

rather than in the Statute. In this form they may be readily amended without necessary Congressional action. This is particularly desirable in view of the many revisions of the income tax laws in this Bill which must be reflected in these regulations." The posture of the 83rd Congress, in deciding that consolidated returns would be effected by regulations rather than by code sections, has led to many problems. Congress should take away from the Internal Revenue Service the formulation of the consolidated return laws, as this would remove the Commissioner's authority to promulgate laws which are in fact detrimental to a group desiring to file consolidated returns, and put the legislative authority under the authority of Congress where legislative relief belongs. The Statutory Authority given the Commissioner in Code Section 1501 provides that the making of a consolidated return requires a member of a group to consent to the consolidated regulation. To further solidify the power of the

Commissioner, Regulation Section 1.1502-80 at Paragraph 40.01 provides "the code, or other law, shall be applicable to the group to the extent the regulations do not exclude its application." Literally interpreted, the Commissioner can set any rules he likes with respect to the filing of consolidated returns. Congress, by enacting such open-ended law, has unconstitutionally delegated its responsibility to the Executive branch, and taxpayers are without recourse, with even the courts being reluctant to grant relief.

As to the question of whether the regulations for a consolidated return is within the scope of the delegation in Code Section 1502, the Court in Commissioner vs. South Texas Lumber Company, 333 U.S. 496 stated that "Treasury regulations must be sustained unless unreasonable and plainly inconsistent with the Revenue statutes. This is particularly true when such regulations are specifically authorized by the Statute since unlike ordinary Treasury

regulations, they are legislative in character and have the force and effect of law." In Union Electric Company of Missouri vs. U. S., 305 F.2d 850, such an authorization as provided in Code Section 1502 gives "added reasons why interpretations of the act and regulations under it should not be overruled by the Courts unless clearly contrary to the will of Congress."

It has been an accepted principle that Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received Congressional approval and have the effect of law. United States vs. Correll, 389 U.S. 299.

At the very least, the consolidated return regulations should be clear, precise, and easily interrupted, and should afford the taxpayer some measure of legislative relief or justice in determining the appropriate application of the regulations to unusual situations.

It is Code Section 1502 which grants the Commissioner the ability to prescribe such regulations as he may deem necessary in order that the tax may be determined in such manner as clearly to reflect the income tax liability and to prevent avoidance of such liability. In no other area of federal taxation is the Commissioner of Internal Revenue given this kind of authority. However, the Commissioner has not shirked his duty. To date, the Commissioner has promulgated 37 regulations containing some 500 major sub-sections. And in order not to be outdone, the regulations are as complex as any law passed by Congress. Yet the regulations provide about the only vehicle for the collection of millions in federal income taxes from corporations ranging in size to billions of dollars.

The last major revision in the regulations became effective for tax years ending after December 31, 1965. Since that time, only 39 published Revenue rulings have been

issued regarding the consolidated regulations. As a contrast, during the same time period, four times as many Revenue rulings and procedures were issued regarding charitable contributions. Yet the regulations, which are the real laws for consolidated returns, are three times as long as the charitable contributions Code Section.

In summary, for Congress to make a delegation of legislative powers such as is illustrated above clearly provides taxation without representation, a denial of due process of law, a denial of equal protection under the law, and is a clear abuse of power on the parts of both the grantor and the grantee, in direct violation of the Constitution.

2. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL AS TO THE PROPER INTERPRETATION OF 26 U.S.C. SECTION 6081(b).

Section 6081 of the Internal Refenue Code provides for extensions

of time for filing returns, and Section 6081(b) provides for automatic extension for corporation income tax returns. An extension of three months for the filing of the return of income taxes imposed by sub-title A shall be allowed any corporation if, in such manner and as such time as the Secretary may by regulations prescribe, there is filed on behalf of such corporation the form prescribed by the Secretary, and if such corporation pays, on or before the date prescribed for payment of the tax, the amount properly estimated as its tax for the first installment thereof required under Section 6152; but this extension may be terminated at any time by the Secretary by mailing to the taxpayer Notice of such termination at least 10 days prior to the date for termination fixed in such Notice.

In its Opinion under III, Taxpayers Right to File a Consolidated Return, the Court of Appeals stated "the current regulation that specifies

when the privilege of filing a tentative return may be exercised . . . ." This indicates that the Court of Appeals in comparing the present case with a case cited by the petitioner, Daron Industries, Inc. vs. Commissioner, 62 TC 847 (1974), considered Daron's filing of Form 7004, Application For Automatic Extension Of Time To File Corporation Income Tax Return, to be a tentative return. The Court of Appeals goes on to say that because Daron filed this "tentative return" timely, they should not be deprived the privilege of filing a consolidated return eventhough the return itself was filed late. This seems to be the reasoning for at least in part justifying the allowance of late filing by Daron and the disallowance of late filing by the petitioner.

Nowhere in any case, Statute, regulation, or on Form 7004 itself can there be found any information or indication that Form 7004,

Application For Automatic Extension, amounts to the filing of a tentative income tax return. In fact, on the back of the form under Instruction H, is found the statement "the filing of this form by a parent corporation is not considered as an exercise of the privilege to making a consolidated return." Instructions further advise that the application should be filed on or before the original due date of the corporation's income tax return, and that a copy of the application should be attached to the corporation's income tax return when it is filed. The application is in no way a substitute for the required income tax return, nor is it a tentative return filed preliminarily in anticipation of the required income tax return. It is not a return at all. The only reference to "tentative" in connection with Form 7004 is found at Line 3(a) on the application, which reads "tentative amount of income tax for the taxable year . . . .".

Furthermore, if the application for automatic extension expires without the required income tax return having been filed during the extended period, it is as though the automatic extension was never obtained for purposes of penalty, interest, etc.

Separate corporations may file separate Form 7004's to obtain an automatic extension of time, and thereafter file a consolidated income tax return within the extended period. Or, a parent corporation may file a Form 7004 and list thereon the members of the affiliated group, and a consolidated return may then be filed for the parent and affiliates within the extended time. However, neither of these privileges in any way make the Form 7004 a tentative income tax return.

The language used by the Court of Appeals in the above mentioned paragraph and in another paragraph under the same topic of a taxpayer's right to file a consolidated return ("because its "tentative return" was made upon the basis of a consolidated

return, the regulations required that its final return be made on the same basis") clearly indicates that the Court of Appeals considers a Form 7004, Application for Automatic Extension of Time to File Corporate Income Tax Return, to be a "tentative return", a finding on the subject that is totally without precedent.

3. THE DECISION BELOW VIOLATES DUE PROCESS OF LAW AND DENIES EQUAL PROTECTION UNDER THE LAWS BY ARRIVING AT DIFFERENT CONCLUSIONS OF LAW IN SUBSTANTIALLY IDENTICAL CASES.

The arbitrary application of the Internal Revenue Code and regulations resulted in a completely different decision in the Court of Appeals in the present case as compared to a similar case wherein an opposite conclusion was reached. This is significant because of the scarcity of substative case law concerning consolidated tax returns.

In Daron Industries, Inc.,62 TC 847, a parent and its subsidiary corporations filed a consolidated

return for the year 1964 six days after the due date of the return, including extensions of time granted by the Commissioner. On that return, substantial income was reported. The Tax Court held that it was a valid consolidated return, rejecting the Commissioner's contention that the late filing invalidated the election to file a consolidated return.

In the present case, the respondent and the Court of Appeals contend that the decision in Daron does not apply to the present case because a pre-1966 regulation was determinative, whereas a post-1965 regulation would apply to the present case.

The Court decided Daron in light of regulation 1.1502-10A:

> Section 1.1502-10A, Exercise of Privilege. (a) When privilege must be exercised. The privilege of making a consolidated return under Section 1502 for any taxable year of any affiliated group must be exercised at the time of making the return of the common parent corporation for such year.

> For this purpose, the return is considered made on the due date of such return (including any extensions of time granted by the Commissioner), regardless of the actual previous date of filing. Under no circumstances can such privilege be exercised at any time thereafter * * * If the privilege is exercised at the time of making the return, separate returns can not thereafter be made for such year * * *

The Commissioner contended that this regulation changed the meaning of former regulations, and precluded Daron from being able to file a consolidated return because it filed its return six days late. In overruling the Commissioner, the Court stated:

> "If the validity of the 1964 return in this case were considered under these regulations, it seems clear that it would not be disqualified as a consolidated return.

The first sentence specified that the privilege must be exercised "at the time of making the return" - a condition that was satisfied herein - and the second sentence provided merely that "under no circumstances can such privilege be exercised at any time thereafter" - a condition having no relevance in this case, since no attempt was made here to exercise the privilege after Daron ("a common parent corporation") had made its 1964 return. Plainly what the "under no circumstances" sentence was seeking to achieve was to prevent the exercise of the privilege to file a consolidated return after the common parent corporation had already filed a separate return. It was in that context that the words "at any time thereafter" were used in that sentence;

> in short, the phrase "at any time thereafter" merely referred back to "the making of the return of the common parent" in the first sentence."

The present regulation which the Court of Appeals holds distinguishes the present case from Daron provides as follows:

> (a) The privilege of filing Consolidated Returns - - (1) Exercise of Privilege for First Consolidated Return Year. A group which did not file a consolidated return for the immediately preceeding taxable year may file a consolidated return in lieu of separate returns for the taxable year, provided that each corporation which has been a member during any part of the taxable year for which the consolidated return is to be filed consents (in the manner provided in Paragraph (b) of this Section) to the regulations under Section 1502. If a group wishes to exercise

its privilege of filing a consolidated return, such consolidated return must be filed not later than the last day prescribed by law (including extensions of time) for the filing of the common parent's return. Such consolidated return may not be withdrawn after such last day (but the group may change the basis of its return at any time prior to such last day).

The petitioner is unable to distinguish the apparent difference that the Court of Appeals found in the current and prior regulation that would justify Daron filing a first year consolidated return six days late, while in the present case, the petitioner's return was, according to the Internal Revenue Service, filed several months late. Nowhere did the Court of Appeals say that the difference in the two cases was that one taxpayer filed six days late and the other apparently filed several months late. Instead, the total justification for

ruling for the respondent was on the difference in the two regulations, both of which were promulgated by the Commissioner of Internal Revenue. In arguing against Daron, the Commissioner also stated that the regulation then in force at that time differed from a prior regulation, and that the decision should be unfavorable to Daron. The Court rejected this argument, but when the Commissioner comes along in the present case and makes the same identical argument, that the present regulation differs from a prior regulation which should be applicable in the present case, the Court of Appeals held accordingly.

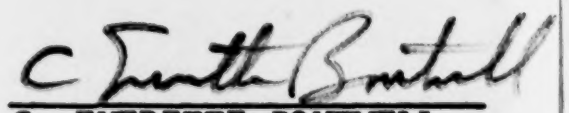
Eventhough all of the lawmaking process in connection with regulations falls within the powers of the Commissioner, it is obvious that he will attempt to arbitrarily apply them to support the position of the Internal Revenue Service when it is unfavorable to a taxpayer. This essentially means that the Commissioner is the first and last word in cases of this type,

a situation which leaves a taxpayer substantially without remedy as long as the Courts continue to uphold the Commissioner in his legislative power and in his arbitrary applications of the regulations that he sees fit to make. However, it is clear that this is a violation of due process of law and a denial of equal protection under the law in a most complex system of taxation.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,



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APPENDIX

MILLETTE & ASSOCIATES, INC.,
Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL
REVENUE, Respondent-Appellee.

No. 78-3229
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

April 27, 1979.

Corporate taxpayer appealed from a decision of the Tax Court that the taxpayer was liable for a deficiency and an addition to tax with respect to its federal income tax for 1972. The Court of Appeals held that: (1) the record amply supported the Tax Court's determination that the taxpayer's consolidated return was not timely filed; (2) the Tax Court's conclusion that the corporate taxpayer did not assign to its subsidiary an agreement to service an insurance program was not clearly erroneous, and (3) in view of record evidence that the taxpayer's president did not take steps to insure that the tax return was timely filed, the taxpayer was liable for a 25% addition to tax.

Decision of the Tax Court affirmed.

*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al., 5 Cir., 1970, 431 F.2d 409, Part I.

1. INTERNAL REVENUE - 1373

In view of the Treasury regulation providing that a group wishing to exercise the privilege of filing a consolidated return must file such return not later than the last day prescribed by law for filing the common parent's return, where corporate taxpayer and its subsidiary had not filed a consolidated return for any year prior to 1972, if the taxpayer and its subsidiary wished to exercise their privilege to file such a return for the year 1972, they were required to file the return not later than March 15, 1973. 26 U.S.C.A. (I.R.C.1954) Section 6072(b).

2. INTERNAL REVENUE - 1501

In absence of any proof that corporate taxpayer and its subsidiary filed consolidated return for tax year 1972 at any time prior to May 9, 1975 and where there was no evidence that the taxpayer obtained any extension of time for filing such consolidated return, record amply supported Tax Court's determination that consolidated return, which was due on or before March 15, 1973, was not timely filed. 26 U.S.C.A. (I.R.C. 1954) Section 6072(b).

3. INTERNAL REVENUE - 1373

Purpose of regulation which precludes filing a consolidated return for the first time after the due date for filing a return has passed is not simply to assure that the consent of all corporations involved is obtained before a consolidated return is filed.

4. INTERNAL REVENUE - 793

An assignment of income from income-producing property will be disregarded for tax purposes unless the property is also assigned; the taxpayer must transfer the tree as well as its fruit in order to avoid tax on the fruit.

5. INTERNAL REVENUE - 1525

Evidence that there was no writing incorporating corporate taxpayer's purported assignment to its subsidiary of agreement to service an insurance program, that taxpayer continued to perform all services under the agreement during the relevant tax year and paid all operating expenses incurred in performance and that the taxpayer's subsidiary was at the time unable to perform the agreement amply supported Tax Court's conclusion that taxpayer had not assigned

the agreement to its subsidiary and that, therefore, commissions paid to the subsidiary under the agreement were includable in taxpayer's income.

6. INTERNAL REVENUE - 1354

Reliance on tax advisors is not reasonable cause for failure to file a return on time; responsibility for assuring a timely filing is the taxpayer's. 26 U.S.C.A. (I.R.C.1954) Section 6651(a).

7. INTERNAL REVENUE - 2368.3

Evidence that corporate taxpayer's president did not take steps to insure that return was timely filed supported Tax Court's finding that there was no reasonable cause for taxpayer's filing of return two years after due date and warranted imposition of an addition to tax. 26 U.S.C.A. (I.R.C.1954) Section 6651(a).

Appeal from the Decision of the Tax Court of the United States.

Before HILL, FAY and RUBIN, Circuit Judges.

PER CURIAM:

Millette & Associates, Inc. appeals

pursuant to Section 7482 of the Internal Revenue Code of 1954, 26 U.S.C., from a tax court decision that it is liable for a deficiency and an addition to tax with respect to its federal income tax for 1972. Millette & Associates, Inc. v. Commissioner, 1978, 37 T.C.M. 774. The tax court concluded that Millette was liable for a deficiency because the consolidated return it filed for 1972 was not timely; therefore, it was not entitled to file a consolidated return. In addition, commissions paid to Millette's subsidiary under an agreement for Millette to service an insurance program for the Ingalls Shipbuilding Division of Litton Industries were held to be properly includable in Millette's income because the agreement had not been assigned to the subsidiary. The court also held that there was no reasonable cause for the late filing of Millette's return, and that, therefore, it was liable for an addition to tax pursuant to Section 6651(a) of the Internal Revenue Code.

Millette asserts: (1) that the tax court's finding that it did not timely file its return is clearly

erroneous; (2) even if the return was not timely filed, it was, nevertheless, entitled to file a consolidated return; (3) even if it filed a late return, its reliance on tax advisors to file its return timely is reasonable cause for the late filing which precludes any liability on its part for an addition to tax, and (4) the court's finding that there had been no assignment of its agreement with Ingalls is clearly erroneous. After careful consideration, we have found these arguments to be without merit, for reasons that we shall briefly explain.

I. Facts

The relevant facts of this case are adequately set forth in the opinion of the tax court; we incorporate by reference in this opinion its statement of the facts.

II. Timeliness of Filing

[1,2] Treasury Regulation Section 1.1502-75(a)(1) provides in part:

If a group wishes to exercise its privilege of filing a consolidated return, such consolidated return must be filed not later than the last day prescribed by law (including extensions

of time) for filing of the common parent's return.

Millette's return for 1972 was due on or before March 15, 1973. See 26 U.S. C. Section 6072(b). Because Millette and its subsidiary had not previously filed a consolidated return for any year prior to 1972, the regulation required that such a return be filed not later than March 15, 1973, if they wished to exercise their privilege to file one. The tax court found, however, that Millette had neither filed a consolidated return on or before that date, nor obtained an extension of time for filing one.

The tax court's determination that the return was not timely filed is amply supported by the record. There was no proof of the specific act of filing the 1972 return at any time prior to May 9, 1975. Although there was much testimony to the effect that a consolidated return was discussed, prepared and forwarded to taxpayer for signing and filing, its president testified that he had no recollection of receiving the return from the preparer

or of signing and filing it. The Internal Revenue Service has been unable to discover any evidence that the return was filed by March 15, 1973. There is also no evidence that the taxpayer obtained any extension of time for filing its return.

III. Taxpayer's Right to File a Consolidated Return

Millette primarily relies upon Daron Industries, Inc. v. Commissioner, 1974, 62 T.C. 847, for its contention that, even if its consolidated return was filed late, it was entitled to file such a return. This reliance is misplaced, however, because the facts in Daron were materially different, and also because Daron was decided at a time when the provisions of the regulation were different. As the tax court noted:

In Daron the taxpayer filed its consolidated return 6 days beyond the extended period of filing. However, the common parent and its subsidiaries had timely filed, on a consolidated basis, an application for an automatic extension of time to file a consolidated

return. In addition the subsidiaries filed the appropriate consents prior to the date that the consolidated return was due. Based on the regulations which applied to pre-1966 years we held that the consolidated return was valid. 37 T.C.M. at 778. The taxpayer in Daron had also deposited an amount sufficient to cover its expected consolidated liability with the Internal Revenue Service prior to the due date for its return; because its "tentative return" was made upon the basis of a consolidated return, the regulations required that its final return be made on the same basis. Daron, supra, 62 T.C. at 855.

In this case the subsidiary's consent to filing a consolidated return with Millette was not submitted until the return was filed in May, 1975. In addition, Millette's requests for extensions of time for filing a return specifically indicated that they were not made on a consolidated basis. Millette also did not make any "tentative returns" of taxes on a consolidated basis.

The current regulation that specifies when the privilege of filing a tentative

return may be exercised is also different from that which applied in Daron, and precludes acceptance of the late return in this case. The regulation involved in Daron, Treasury Regulation Section 1.1502-10[A](a), applied only to taxable years before 1966[1] and provided in part as follows:

The privilege of making a consolidated return under section 1502 for any taxable year of an affiliated group must be exercised at the time of making the return of the common parent corporation for such year. For this purpose, the return is considered as made on the due date of such return (including any extensions of time granted by the Commissioner), regardless of the actual previous date of filing. Under no circumstances can such privilege be exercised at any time thereafter. (Emphasis supplied.)

This provision had been amended to insert the second sentence (the portion emphasized) between the first and third sentences. Based on this history of the regulation, the court concluded

1. See Treasury Regulation Section 1.1502-0(6).

that it had been inserted to allow the privilege of filing a consolidated return to be exercised after the filing of a separate return if both returns were filed prior to the due date for the return. 62 T.C. at 857. The court held that this amendment did not change what it concluded was the rule under the prior regulation - that a consolidated return could be filed after the due date if it was the only return filed. Id.

[3] Daron expressly reserved the issue of how a similar question would be handled under the current regulation, and the court noted that the provisions applicable to later years were "substantially different." 62 T.C. at 855 n.6. The language of the current regulation clearly precludes the filing of a consolidated return for the first time after the due date for filing a return has passed. See also F. Peel, Consolidated Tax Returns, Section 20.01 (2d ed., Supp.1978) at 48. We do not agree with the taxpayer's contention that the requirement of a timely filing is simply to assure that

the consent of all corporations involved is obtained before a consolidated return is filed; it is not apparent how the requirement serves that purpose, and, in any case, the express language of the regulation is controlling.

Millette's reliance upon Corner Broadway-Maiden Lane, Inc. v. Commissioner of Internal Revenue, 2 Cir.1935, 76 F.2d 106, American Pacific Whaling Co. v. Commissioner of Internal Revenue, 9 Cir.1935, 74 F.2d 613, Davis Bros. Restaurant, Inc. v. Commissioner, 1973, 60 T.C. 525, and Motor & Industrial Finance Corp. v. Scofield, W.D.Tex.1955, 55-1 U.S.T.C. Section 9493, is equally misplaced. The consolidated returns in each of those cases were timely filed, and the legal issues involved therein do not relate in any way to Treasury Regulation 1.1502-72(a). Although in Corner Broadway-Maiden Lane the court held that a minor deviation from the regulations (the parent company did not file the return) did not mean that a consolidated return could not be filed, and in Davis Bros.

it held that the return was a consolidated one even though certain aspects of the return were inconsistent with this, both cases relied on the absence of any provision in the regulations that such deviations or inconsistencies would forfeit the right to file a consolidated return; in fact, in Davis Bros. the regulations indicated that the inconsistencies were to be resolved in favor of the return being a consolidated one. To the limited extent that these or the other cases cited by Millette may show a willingness to overlook minor errors in otherwise proper and timely consolidated returns, they are wholly incomparable to the present situation, in which the taxpayer filed its return two years after the due date.

IV. Assignment of Ingalls Agreement

[4,5] Whether Millette had assigned to its subsidiary its agreement to serve an insurance program for Ingalls is important because an assignment of income from income-producing property will be disregarded for tax purposes unless the property is also assigned; the taxpayer must transfer the tree as

well as its fruit in order to avoid tax on the fruit. The tax court's conclusion that there was no assignment of the agreement is not clearly erroneous; the evidence in the record that was cited by the court amply supports its conclusion. This evidence established that there was no writing incorporating the purported assignment, Millette continued to perform all services under the agreement during 1972, paid all operating expenses incurred in performing the services, and the subsidiary was unable to perform the agreement at that time.

V. Liability for Late Filing

[6,7] Section 6651(a) of the Internal Revenue Code of 1954 provides for a 25 percent addition to tax for failure timely to file a return unless such failure is due to reasonable cause. The justification offered by the taxpayer for its failure to file on time is that it relied on its tax advisors to submit the return. However, it is well established that reliance on tax advisors is not reasonable cause for failure to file a return on time; the

responsibility for assuring a timely filing is the taxpayer's. Logan Lumber Co. v. Commissioner of Internal Revenue, 5 Cir.1966, 365 F.2d 846,854; Dritz v. Commissioner, 1969, 28 T.C.M. 874, 882, aff'd, 5 Cir. 1970, 427 F.2d 1176. In view of the evidence in the record that Millette's president did not take steps to ensure that the return was filed, the tax court's holding that there was not reasonable cause for the failure timely to file the return is not clearly erroneous.

For the foregoing reasons, the decision of the Tax Court is AFFIRMED.

T.C. Memo. 1978-180

UNITED STATES TAX COURT

MILLETTE AND ASSOCIATES, INC.,
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No. 5127-76

Filed May 16, 1978.

C. Everette Boutwell, for the petitioner.

Roy S. Fischbeck, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

GOFFE, Judge: The Commissioner determined deficiencies in petitioner's Federal corporate income tax for the taxable year 1972 in the amount of $59,169.92 and addition to tax under section 6651(a),[1] Internal Revenue Code of 1954, in the amount of $14,792.48.

[1] All section references are to the Internal Revenue Code of 1954, as amended.

Due to concessions the issues for decision are:

(1) Whether petitioner is entitled to have its income tax liability for the taxable year 1972 determined on a consolidated basis with its subsidiary, Millette Enterprises, Inc.;

(2) Whether insurance commissions and service fees in the amount of $177,199.35 are includable in petitioner's gross income for the taxable year 1972; and

(3) Whether petitioner is liable for a 25 percent addition to tax under section 6651(a) for failure to file a timely return for the taxable year 1972.

FINDINGS OF FACT

Some of the facts have been stipulated. The stipulation of facts and attached exhibits are incorporated herein.

Petitioner, Millette & Associates, Inc. (hereinafter referred to as Associates), is a corporation organized and incorporated under the laws of the State of Mississippi on

February 24, 1962. Associates engaged in the business of operating an insurance agency. Its principal place of business was Pascagoula, Mississippi, at the time of filing the petition in the instant case. For all taxable years in issue Associates has utilized the accrual method of accounting. Its sole shareholders were Theodore J. Millette, Thomas S. Millette and William G. Millette (hereinafter referred to collectively as the Millettes).

Prior to May 1, 1965, Millette-Straughn, Inc. (Straughn) was a corporation organized and incorporated under the laws of Mississippi and engaged in the business of operating a life insurance agency in Pascagoula, Mississippi. Its outstanding stock was owned by Theodore J. Millette and Thomas S. Millette in equal amounts. On May 1, 1965, Straughn negotiated an agreement with Ingalls Shipbuilding Division of Litton Industries (hereinafter referred to as Ingalls) to service the

group medical insurance plan for the employees of Ingalls. Pursuant to this agreement Straughn contracted with Fireman's Fund American Insurance Company to provide coverage for the insurance plan. Fireman's Fund paid commissions to Straughn based on the amount of premiums paid for coverage. Straughn paid all claims under the agreement from a bank account maintained by Fireman's Fund.

In January 1967 Straughn merged with Associates. Associates succeeded to the agreement with Ingalls and continued to service the group insurance plan for the employees of Ingalls.[2] The merger resulted in stock ownership as follows: Theodore J. Millette - 51 percent; Thomas S. Millette - 24.5 percent; and William G. Millette - 24.5 percent. These stockholders continued to serve as directors and officers of Associates as they had served

[2]The agreement with Ingalls was renegotiated in November 1971 and Associates continued as the servicing agent with Fireman's Fund as the insurance carrier.

prior to the merger.

Instant Builders & Movers, Inc., was a corporation organized and incorporated under the laws of Mississippi in June 1970. Its principal corporate activity included the purchase, ownership and operation of an apartment complex. In addition, it owned a tract of land which was subdivided and improved for purposes of sale. The Millettes were the directors and principal shareholders of Instant Builders & Movers, Inc.

Millette Building, Inc., was a corporation organized and incorporated under the laws of Mississippi in June 1970 for the purpose of owning and operating the Millette Office Building located in Pascagoula, Mississippi. On February 25, 1972, Millette Building was merged with Instant Builders & Movers to form Millette Enterprises (hereinafter referred to as Enterprises). The principal business purpose of Enterprises included the construction, ownership and leasing of office

buildings. Enterprises was also formed for the purpose of participating as an agent in the field of general insurance.[3]

On May 15, 1972, Associates and Enterprises consummated a plan of reorganization whereby Enterprises became a subsidiary of Associates. Following the reorganization the Millettes owned all outstanding stock of Associates and Associates owned 80 percent of all outstanding stock of Enterprises.[4]

Associates purportedly transferred the Ingalls agreement, the commissions and service fees to Enterprises, although there was no formal assignment between Associates and Enterprises. Fireman's Fund was notified to pay the commissions and service fees earned under the agree-

[3]Enterprises was licensed as an insurance agency in Mississippi on September 1, 1972.

[4]The remaining 20 percent of outstanding stock was owned by James Tackett.

ment to Enterprises.[5] However, insurance commissions paid by Fireman's Fund were credited to Associates' account as late as December 1973. Associates continued to perform services under the agreement with Ingalls during 1972 as it had done in prior years. It furnished office facilities, Employees and paid all operating expenses connected with the Ingalls agreement. Enterprises did not have the ability or capacity to administer the services due to a lack of staff, office equipment, and financing.

The corporate books of Associates for 1972 reflect the following:

Gross Receipts	$115,400.00*
Gross Rental Income. .	1,220.00
Expenses	171,327.00

*This amount ($115,400.00) includes commissions earned by Associates

[5]On September 11, 1972, the Merchants and Marine Bank of Pascagoula, Mississippi, received insurance commissions paid by Fireman's Fund in the amount of $17,637.13, as partial satisfaction of a loan made to Associates.

during November and December 1971 in the respective amounts of $3,329.91 and $15,202.50.

The corporate books of Enterprises for 1972 (from February through December 1972) reflect the following:

Commissions from Fireman's Fund	$177,199.35
Cost of servicing Ingalls Agreement, per month	4,000.00*

*This amount includes expenses for salaries, payroll taxes, telephone, postage, rent, supplies and equipment depreciation.

In 1974 respondent conducted an audit of Associates' income tax return for the taxable year 1972. Pursuant to the audit Associates furnished a copy of a return which had been prepared for the taxable year 1972 by Mr. Clinton Walker, Jr., a certified public accountant. During 1972 the Millettes, along with Mr. Walker discussed the possibility of filing a consolidated return for Associates and Enterprises for the taxable year 1972. The discussions were extensive and included

the participation of Associates' tax attorney. As a result, Mr. Walker prepared a consolidated return for the taxable year 1972 and mailed it to Theodore Millette, president of Associates. Mr. Millette does not remember receiving the consolidated return from Mr. Walker nor does he remember signing or filing a return for 1972. On two occasions during the audit respondent filed a request for a corporate income tax return of Associates for 1972. Each time respondent was notified by the Internal Revenue Service Center, Chamblee, Georgia (hereinafter referred to as Atlanta Service Center), that no return had been filed by Associates for the taxable year 1972.[6]

On May 9, 1975, the Atlanta Service Center received a copy of a Federal corporate income tax return from Associates. The return

[6]For the calendar year 1972 all Mississippi taxpayers were required to file their returns with the Atlanta Service Center.

was signed by Theodore Millette and indicated that it was a consolidated return for the taxable year 1972. A note accompanied the copy of the return and stated that Associates' accountant had timely prepared a consolidated return for the taxable year 1972. The note further stated that the return for 1972 had been forwarded by the accountant to Associates for signature and filing.

The copy of the return received by the Atlanta Service Center on May 9, 1975, differed from the copy of the return furnished pursuant to the audit conducted in 1974 in that the latter included only work papers of Associates for its taxable year 1972. The copy of the return filed in 1975 disclosed that for 1972 Associates and Enterprises had income of $116,660 and $326,294, respectively; total deductions of $171,227 and $375,235, respectively; and operating losses of $54,567 and $48,941, respectively, which generated a consolidated operating loss of $103,508.

In April 1977 Associates requested the custodian of records at the Atlanta Service Center and the Federal Records Center[7] to prepare a transcript of Associates' account for 1972. In response to this request, the custodians reported that a copy of a consolidated return for 1972 had been filed May 9, 1975, and that no extensions of time to file corporate income tax returns had been submitted by or on behalf of Associates or Enterprises. Again, prior to the trial of the instant case

[7] Jurisdiction of the Atlanta Service Center extends to the States of Mississippi, Alabama, Florida, Georgia, and South Carolina. In addition to filing their respective returns with the Atlanta Service Center, Mississippi taxpayers could also file their returns with any Internal Revenue Service District Office in Mississippi. In such event, the District Office followed the standard operating procedure of forwarding the return to the Atlanta Service Center. Corporate returns filed at the Atlanta Service Center are kept at least six months. Thereafter, the returns are transferred to the Federal Records Center at Eastport, Georgia, where they remain for seven years. Eventually the returns are again transferred to the Records Center at Mechanicsburg, Pennsylvania, where they remain forever.

counsel for Associates and respondent requested the custodian to conduct another search of files and records in an effort to ascertain the existence or nonexistence of a consolidated return filed by Associates. The results of this search were the same as the previous search.

The Commissioner, in his statutory notice of deficiency, determined that:

(1) Associates had not filed a Federal corporate income tax return for the taxable year 1972 within the time prescribed by law;

(2) because Associates had not shown that the failure to file the return on time was due to reasonable cause, Associates was subject to the penalty provisions of section 6651(a); and

(3) the gross receipts of Associates for the taxable year 1972 should include the total commissions earned during 1972 pursuant to the Ingalls agreement.

OPINION

The first issue for decision is

whether petitioner is entitled to have its income tax liability for the taxable year 1972 determined on a consolidated basis with its subsidiary, Enterprises, under section 1501, Internal Revenue Code of 1954. Petitioner contends that it timely filed a consolidated return for the taxable year 1972. In the alternative petitioner argues that the late filing of the consolidated return in May 1975 does not preclude the application of section 1501. Respondent takes the position that petitioner and Enterprises are not entitled to the privilege of having their income tax liability determined on a consolidated basis due to failure to file a consolidated return within the time prescribed by law. Respondent argues that the prerequisites set forth in section 1.1502-75(a)(1), Income Tax Regs., must be satisfied before petitioner is entitled to file a consolidated return. We agree with respondent.

Section 1.1502-75(a)(1), Income Tax Regs., provides in part:

> If a group wishes to exercise its privilege of filing a consolidated return, such consolidated return must be filed not later than the last day prescribed by law (including extensions of time) for filing of the common parent's return. * * * [Emphasis added.]

The last day prescribed by law for the filing of petitioner's (the common parent) return for the taxable year 1972 was March 15, 1973. Sec. 6072(b), I.R.C. 1954.

In order to invoke the privilege of filing a consolidated return, it is necessary to strictly comply with the regulations promulgated under section 1502. General Manufacturing Corp. v. Commissioner, 44 T.C. 513 (1965); Oklahoma Contracting Corporation v. Commissioner, 35 B.T.A. 232 (1937); Smith Paper Company v. Commissioner, 31 B.T.A. 28 (1934). Therefore, petitioner was required to file the consolidated return by March 15, 1973, or obtain an extension and file the return within the extended period. However, the record before us indicates that petitioner neither filed a consolidated

return on or before March 15, 1973, nor obtained an extension for filing it. Petitioner's accountant testified that he prepared a consolidated return for petitioner and mailed it to Theodore Millette, president of petitioner. Mr. Millette testified that he could neither remember receiving the consolidated return from his accountant, nor remember signing, mailing or filing a consolidated return for petitioner's taxable year 1972. In addition, petitioner offered purported copies of applications for an extension of time to file its return, as well as a copy of a consolidated return for 1972 which had been given to respondent during its audit in 1974 and subsequently filed with the Atlanta Service Center on May 9, 1975. However, the return given to respondent during the audit differs dramatically from the return subsequently filed in 1975 in that the return given to respondent in 1974 contained no consolidated schedule. It contained work papers relating to petitioner.

Extensive searches were conducted by the custodians of the Atlanta Service Center and the Federal Records Center pursuant to the requests of both petitioner and respondent. The results of these searches failed to produce any evidence which would indicate that petitioner had timely filed a consolidated return for 1972 or an extension of time to file it.

Petitioner relies on Daron Industries, Inc. v. Commissioner, 62 T.C. 847 (1974), and Davis Bros. Restaurant v. Commissioner, 60 T.C. 525 (1973). The decisions of both Daron and Davis are inapposite to the facts in the instant case. In Daron the taxpayer filed its consolidated return 6 days beyond the extended period of filing. However, the common parent and its subsidiaries had timely filed, on a consolidated basis, an application for an automatic extension of time to file a consolidated return. In addition the subsidiaries filed the appropriate consents prior to the date that the consolidated return was due. Based on the regulations which applied to

pre-1966 years we held that the consolidated return was valid. In so holding we stated:

> These provisions are applicable only to the taxable years beginning before January 1, 1966, ***. The substantially different provisions of section 1.1502-75 are applicable to later years, *** and our decision herein is not intended to be dispositive of any similar question arising under those regulations governing post-1965 years. [62 T.C. at 855, n.6.]

In Davis we held that two corporations, members of an affiliated group, filed a consolidated return which had the effect of terminating the controlled group's multiple surtax exemption election. The single return filed by the two corporations met the requirements of the regulations promulgated under section 1502 (i.e., a single return which combined their income, deductions, and credits).

Therefore, petitioner is not entitled to the privilege of having its income tax liability for the taxable year 1972 determined on a consolidated basis with its subsidiary Enterprises. Petitioner has

failed to carry its burden of proof of establishing that it complied with the conditions of section 1.1502-75 (a)(1), Income Tax Regs., which require a consolidated return to be filed within the time prescribed by law.

The next issue for decision is whether insurance commissions and service fees in the amount of $177,199.35 are properly includable in the gross income of petitioner for the taxable year 1972. Respondent takes the position that the commissions and fees are includable in the gross income of petitioner because petitioner actually earned them. Petitioner contends that the Ingalls agreement, from which the commissions and fees came, was assigned to Enterprises by petitioner and therefore any income flowing from the agreement is includable in the gross income of Enterprises.

During 1965 the Millettes, in their capacity as officers of petitioner (Straughn at that time) entered into an agreement with Ingalls

to service the group insurance plan for its employees. The Millettes contracted with Fireman's Fund to provide coverage for the plan. Straughn merged with petitioner in 1967 and all rights under the Ingalls agreement were acquired by petitioner. In May 1967 petitioner acquired 80 percent of the stock of Enterprises. Petitioner continued to service the plan from 1967 through 1972. Sometime in 1972 petitioner notified Fireman's Fund to pay the insurance commissions and service fees generated from the Ingalls agreement to Enterprises. However, no documentation regarding either the purported assignment of the Ingalls agreement or the transfer of the commissions and fees to Enterprises was produced during the trial. Petitioner continued to perform all services under the agreement during 1972. It used its office facilities, employees and paid all operating expenses incurred in per-

forming the services.[8] Enterprises was unable to perform under the agreement due to lack of staff, equipment and, most importantly, financial stability. These facts raise the questions of who actually earned the commissions and fees.

It is an axiom in tax law that income must be taxed to him who earns it. Commissioner v. Culbertson, 337 U.S. 733 (1949). An equally basic principle is that one who earns income cannot avoid taxation by diverting it to another entity. United States v. Basye, 410 U.S. 441 (1973); Lucas v. Earl, 281 U.S. 111 (1930). The earner of income is one whose personal efforts produced it. Clearly petitioner earned the commissions and fees under the Ingalls agreement. Enterprises was unable to perform the services required under the agreement. The agreement by its very nature was executory and carried with it no right

[8]Petitioner paid all withholding and FICA taxes for all employees who serviced the Ingalls agreement.

to income without performance by the servicing agent. Petitioner concedes this fact. Moreover, petitioner controlled the production and amount of income which came from servicing the Ingalls agreement. American Savings Bank v. Commissioner, 56 T.C. 828 (1971); Ronan State Bank v. Commissioner, 62 T.C. 27 (1974). Accordingly, we find that the commissions and fees amounting to $177,199.35 were earned by petitioner in 1972. Petitioner's argument that it was the agreement which was assigned to Enterprises and not the income has no basis in the record before us. This is especially true in light of the nature of the agreement between petitioner and Ingalls (i.e., executory in nature).

The final issue for decision is whether petitioner is liable for a 25 percent addition to tax under section 6651(a) for failure to file a timely return for the taxable year 1972. Section 6651(a) provides for an addition to tax for failure to

timely file a return unless such failure is due to reasonable cause and not willful neglect. Petitioner takes the position that any delay in filing its return for 1972 was due to its president's not being knowledgeable of filing deadlines and the reliance it placed on tax advisers to see that the 1972 return was timely filed. It is well-settled that the absence of willful neglect in failure to file a timely return does not preclude the application of section 6651(a). Lee v. Commissioner, 227 F.2d 181 (5th Cir. 1955). Petitioner must further show that the failure to timely file its return for 1972 occurred in spite of the exercise of ordinary business care and prudence. Mauldin v. Commissioner, 60 T.C. 749 (1973). It has failed to do this. The testimony is uncontradicted on this matter. Neither the accountant nor Mr. Millette, president of petitioner, took steps to assure a timely filing. Mr. Millette could not remember whether

he received the return prepared by petitioner's accountant. Moreover, he could not remember signing or filing a return for the taxable year 1972 in his capacity of president of petitioner. Therefore, we cannot hold that the failure to file a timely return was based on reasonable cause. BJR Corporation v. Commissioner, 67 T.C. 111 (1976); Cf. Logan Lumber Co. v. Commissioner, 365 F.2d 846 (5th Cir. 1966). Accordingly, we hold that petitioner is liable for an addition to tax under section 6651(a).

Decision will be entered under Rule 155.

3C

No. 79-129

In the Supreme Court of the United States

OCTOBER TERM, 1978

MILLETTE & ASSOCIATES, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

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COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The sole question presented in this federal income tax case is whether the decision below correctly held that petitioner was not entitled to have its tax liability for 1972 determined on a consolidated basis with its subsidiary because it had failed to file a timely consolidated income tax return.

The pertinent facts are undisputed and may be summarized as follows: Petitioner is a corporation which, since May 15, 1972, has owned 80% of the outstanding stock of Millette Enterprises, Inc. (Pet. App. A-21). During 1972, petitioner's shareholders and officers discussed with their accountant and tax attorney the possibility of filing a consolidated corporate income tax return for petitioner and Enterprises for the taxable year

(Pet. App. A-23 to A-24). As a result of these discussions, a consolidated return was prepared (Pet. App. A-24). Although the return was due to be filed by March 15, 1973 (Pet. App. A-29), the Internal Revenue Service did not receive it until May 9, 1975 (Pet. App. A-24). On audit, the Commissioner of Internal Revenue determined that petitioner was not entitled to have its income computed on a consolidated basis with that of Enterprises because it had failed to comply with Treasury Regulations on Income Tax, Section 1.1502-75(a)(1) (26 C.F.R.), which requires a group exercising the privilege of filing a consolidated return for the first time to file such return not later than the due date of the return for the common parent (Pet. App. A-27 to A-28). The Tax Court upheld the Commissioner's determination (Pet. App. A-32 to A-33), and the court of appeals affirmed (Pet. App. A-15).

1. Petitioner urges (Pet. 11-19) that it was unconstitutional for Congress to have delegated to the Commissioner of Internal Revenue the authority to prescribe regulations with respect to the making of consolidated returns. See Section 1502 of the Internal Revenue Code of 1954 (26 U.S.C.). But the validity of the Treasury Regulations governing consolidated income tax returns has long been recognized. *Ilfeld Co.* v. *Hernandez*, 292 U.S. 62, 65 (1934); *Woolford Realty Co.* v. *Rose*, 286 U.S. 319, 330-331 (1932); *S. Slater & Sons, Inc.* v. *White*, 119 F. 2d 839, 845 (1st Cir. 1941). Since the judiciary's inquiry in cases concerning such regulatory prescription "begins and ends with assuring that the Commissioner's regulations fall within his authority to implement the congressional mandate in some reasonable manner" (*United States* v. *Correll*, 389 U.S. 299, 307 (1967); see *National Muffler Dealers Ass'n.* v. *United States*, No. 77-1172 (Mar. 20, 1979), slip op. 5), there is no basis for petitioner's constitutional challenge.

2. Petitioner further contends (Pet. 24-31) that it was denied equal protection of the law because the court of appeals reached a result different from that of the Tax Court in *Daron Industries, Inc.* v. *Commissioner*, 62 T.C. 847 (1974). But the Equal Protection Clause does not "'assure uniformity of judicial decisions.'" *Beck* v. *Washington*, 369 U.S. 541, 554 (1962), quoting *Milwaukee Electric Ry. & Light Co.* v. *Wisconsin ex rel. Milwaukee*, 252 U.S. 100. 106 (1920). As the court of appeals correctly noted (Pet. App. A-8 to A-13), *Daron* is not only factually distinguishable from this case, it also involved a different Treasury Regulation than is involved here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

SEPTEMBER 1979

DOJ-1979-09